No. 15307

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Appellant,

vs.

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; AND WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA,

Appellees.

On Appeal From an Order of the United States District Court for the Southern District of California.

BRIEF FOR APPELLEES.

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D. B. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mac) Folden; Grammont Banville; Joe Loera; Anastacio Holquin; William L. (Roy) Miller; Otto Schubert; Walter O. Lisser; and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America,

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BRIEF FOR APPELLEES.

Preliminary Statement.

This brief is presented jointly by Appellees because the questions of law are the same to all parties, costs and fees will be greatly reduced and the record will be less burdensome to this Court.

The facts in this case present the following legal questions:

1. Does the National Labor Relations Board (hereinafter referred to as the "Board") have power under the National Labor Relations Act, as amended, to delegate to subordinates the authority to issue subpoenas?

2. Does the Board have the power to delegate to subordinates the authority to pass upon a petition to revoke a subpoena?

3. Under the Statute and Board Rules and Regulations may a subpoena be issued upon the application of an attorney employed by the General Counsel?

In an opinion by Judge Peirson M. Hall of this Federal District Court in the case of *N. L. R. B. v. Pesante,* 119 Fed. Supp. 444, Judge Hall gave a "No" answer to the second and third questions. Judge Hall ruled that the Board does not have authority to delegate to subordinates the power to rule upon a petition to revoke a subpoena and that a subpoena may not be issued upon the application of an attorney employed by the Regional Director or General Counsel. In the case of *N. L. R. B. v. Duval Jewelry Co.,* 141 Fed. Supp. 860, Federal District Court Judge Choate gave a "No" answer to the third question. Judge Choate ruled that a subpoena may not be issued upon the application of an attorney employed by the Regional Director of the National Labor Relations Board. We adopt and rely on the reasoning and decision of Judge Hall in the *Pesante* case, *supra,* and Judge Choate in the *Duval* case, *supra.*

I.

The National Labor Relations Board Does Not Have Authority to Delegate Its Subpoena Power to Subordinate Officers.

The practice adopted by the Board of having members of the Board sign innumerable subpoenas in blank form and furnishing these subpoenas to subordinates such as the Regional Directors is a peculiar practice. It seems probable that the practice is evidence that the Board had doubt as to its ability to delegate the issuance of subpoenas and attempted to straddle the issue by having the Board members sign the subpoenas although they are actually issued by the subordinates. In this connection it is to be noted that Section 11 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. A. (Supp.), Secs. 151, *et seq.*), hereinafter referred to as "the Act", refers only to the issuance of subpoenas and does not mention the signing of subpoenas. In any event, whatever the reason for the practice it is clear in view of Section 102.58(c) of the Board's rules and regulations, and the decision in *N. L. R. B. v. John S. Barnes Corp.*, 178 F. 2d 156, that this case involves the direct issue whether the Board has the authority to delegate its subpoena power (that is, the power to issue and/or revoke subpoenas) to subordinate officers. The rubber stamp signing of subpoenas by a member of the Board is to be disregarded in the examination of this basic issue of delegation.

(a) The Provisions of the Act Demonstrate Conclusively That the Subpoena Power Is Not Delegable.

We believe that the terms of the Act itself demonstrate conclusively that the subpoena power is not delegable. We will also discuss below the legislative history of the Act and the cases in point, but we wish to discuss first the terms of the Act.

Section 11 of the Act provides with respect to the subpoena power as follows:

> "Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—
>
> "(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent

> or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

The Court will note that there are five sentences in subsection (1) of Section 11. The fifth sentence can be disregarded for present purposes. The Court's attention is called to a comparison of the first and fourth sentences as against the second and third sentences.

The first sentence, in providing for the examination of evidence and the right to copy evidence, gives the power to the Board "or its duly authorized agents or agencies" —a clear authority to delegate that power.

The fourth sentence, in providing for the administering of oaths, examination of witnesses and the receiving of evidence, also vests the power in any member of the Board "or any agent or agency designated by the Board for such purposes." Here again the authority given to the Board may be delegated.

On the other hand, the second sentence, which provides for the issuance of subpoenas, gives the power only to "The Board, or any member thereof." In the third sentence, which provides for revocation of the subpoena, the power is given to "the Board."

It is submitted that any reasonable person who reads Section 11(1) must conclude without reference to the legislative history, cases or other aids to construction, that Congress specifically provided for delegation by the Board when it intended such delegation and omitted the power

to delegate when it intended that the Board, or a member thereof, should not delegate. If a statute is clear, the Court need not go outside the statute to construe it.

(b) The Legislative History of the Act Also Establishes That the Subpoena Power Is Not Delegable.

In addition to the clear language of the statute, we wish to point out also that the legislative history of the Act establishes that Congress intended that the power to issue subpoenas and to revoke subpoenas could not be delegated. References hereafter are to "Legislative History of the Labor Management Relations Act, 1947, Vol. I (National Labor Relations Board, 1948)."

The first step in the legislative process was H. R. 3020, as reported by the Committee on Education and Labor and as it passed the House of Representatives initially. (Legislative History, op. cit., pp. 74, 201.) This version provided as follows:

> "Sec. 11. For the purpose of any proceeding before the Board, or before a member, examiner, or examiners thereof, or for the purpose of any investigation by the Administrator under Section 9—
>
> "(1) The Board, or any member thereof, *or any trial examiner* shall, upon application of the Administrator or any party to such proceedings, forthwith issue to the Administrator or to such party as the case may be, in the name of the Board, subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence or under his control, such person may petition the Board, *or its duly authorized agent or*

agents, to revoke and the Board, *or such agent or agents,* shall revoke such subpoena if in its, *his, or their* opinion, as the case may be, the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its, *his, or their* opinion, as the case may be, such subpoena does not describe with sufficient particularity the evidence whose production is required. The Administrator, or any member of the Board, *or any examiner or examiners designated by the Board for such purposes,* may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing." (Emphasis added.)

The language which should be noted particularly is italicized.

The original Senate version, S. 1126, as reported by the Committee on Labor and Public Welfare and H. R. 3020 as it passed the Senate initially, both provided as follows (Legislative History, op. cit. pp. 133, 261):

"Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the

production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

The Court will note that the Senate Bill contained language entirely different from the House Bill.

Section 11(1) of the Act, as finally adopted (29 U. S. C. A. (Supp.), Sec. 161), is a compromise between the House and the Senate versions. The House provision for an automatic issuance of a subpoena plus the power to revoke was adopted, but the language of the House version regarding delegation of the subpoena power to a "trial examiner" (in the case of issuance of the subpoena) and the delegation to "duly authorized agent or agents" (in the case of revocation of the subpoena) was omitted. In addition, the Senate version was changed to permit the Board to issue subpoenas as well as "any member of the Board."

We submit that the change in language between the original House version and the final statute must lead to the conclusion that the Congress intended to permit delegation with respect to the powers granted in the first and fourth sentences of Section 11(1), but did not intend to permit delegation with respect to the power of issuing and revoking subpoenas contained in the second and third sentences.

Of course, it is Hornbook law that courts cannot legislate, and this Honorable Court must uphold the statute as written.

(c) The Foregoing Conclusion Is Also Supported by Supreme Court Decisions.

The Supreme Court of the United States has expressed itself on the subject of delegation of the subpoena power in other administrative agencies but has not considered the question involved in the present case. The two principal cases are cited in the Brief filed by the Board—*Cudahy Packing Co. v. Holland,* 315 U. S. 357, 86 L. Ed. 895 (1942), hereafter referred to as "Cudahy", and *Fleming v. Mohawk Wrecking & Lumber Co.,* 331 U. S. 111, 91 L. Ed. 1375 (1947), hereafter referred to as "Mohawk". We rely upon *Cudahy,* the Board upon *Mohawk,* and we believe that an examination of the two cases will show very clearly that the present case is governed by *Cudahy.*

The issue presented by the Board in its Brief involving Section 7(b) of the Administrative Procedure Act does not affect Appellees' position on this point unless this Court finds under Section 7(b) an express power given Trial Examiners to revoke subpoenas, which we submit it does not. This point will be discussed later in Appellees' Brief.

The *Cudahy* case held that the Administrator of the Fair Labor Standards Act did *not* have the power to delegate to his subordinates the authority to issue subpoenas. The Court said in part:

> "The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power."

The *Mohawk* case held that the Administrator of the Emergency Price Control Act *was* authorized to delegate to district directors authority to issue subpoenas. The Court, in the *Mohawk* case, approved the *Cudahy* case but held that the *Cudahy* case did not apply to the facts of the *Mohawk* case because of five points discussed in the opinion. Since the *Mohawk* case is later in point of time, and since it distinguishes the *Cudahy* case, we wish to discuss the Court's reasoning in the *Mohawk* case step by step.

The first point made by the Court in the *Mohawk* case (331 U. S. 111, 120) was that the legislative history of the Fair Labor Standards Act involved in the *Cudahy* case showed that a provision granting authority to delegate the subpoena power had been eliminated when the Bill was in Conference. On the other hand, the Court pointed out that the legislative history of the Emergency Price Control Act showed that the Senate Committee report on the bill had stated specifically that the Administrator could delegate any of the powers given to him by such bill. Thus, there are two points of difference in the legislative history of the statutes considered by *Cudahy* and *Mohawk*.

It is apparent that the present case is almost identical with the *Cudahy* situation and is entirely different from the *Mohawk* case. We have already pointed out that the House bill provided for delegation of the subpoena power but that in Conference this provision was eliminated. In the second place, there is nothing in any of the committee reports or in the discussion on the floor of Congress which indicates that the subpoena power can be delegated. Therefore, on the first point of the *Mohawk* opinion, it is clear that the *Cudahy* case controls the present case.

The second point made by the Court in the *Mohawk* case (331 U. S. 111, 121) is that the Fair Labor Standards Act involved in the *Cudahy* decision expressly made delegable the power to gather data and make investigations, the Court in the *Mohawk* case stating that this lends "support to the view that when Congress desired to give authority to delegate, it said so expressly." On the other hand, the Emergency Price Control Act did not contain a provision specifically authorizing delegation of other functions.

Compare the present Act on this point. Like the Fair Labor Standards Act, the present Act expressly grants the power to delegate in several specific areas. First, Section 3(b) authorizes the Board to delegate any of its powers to any group of three or more of its members. Second, Section 5 provides that the Board may delegate the power to prosecute an inquiry necessary to its functions. Third, Section 11(1) provides that the Board's power to examine evidence can be delegated to its agents or agencies. Finally, Section 11(1) provides that the power to administer oaths, examine witnesses and receive evidence can be delegated to the Board's agents or agencies. Therefore, the principle relied upon by the Court in the *Mohawk* case to support the *Cudahy* result, is applicable to the present case even more so than it was in the *Cudahy* case. Obviously, on this second point of argument, the *Cudahy* case should be followed here.

The third point of the Court in the *Mohawk* case (331 U. S. 111, 121) is that the Fair Labor Standards Act of the *Cudahy* case incorporated by reference certain sections of the Federal Trade Commission Act, whereas the Emergency Price Control Act contained its own description of the subpoena power.

Again, compare the present Act. This Act does not incorporate the provisions of the Federal Trade Commission Act by reference but in fact copies portions of the Federal Trade Commission Act almost verbatim. This point appears clearly from a comparison of the pertinent provisions of the three Acts, the Emergency Price Control Act, the Federal Trade Commission Act and the present Act.

Emergency Price Control Act:

> "The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena, require any such person to appear and testify or to appear and produce documents, or both, at any designated place." (Sec. 202 of the Act; 50 U. S. C. A. App. Sec. 922.)

Federal Trade Commission Act:

> "For the purposes of sections 41-46 and 47-58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses and receive evidence." (15 U. S. C. A., Sec. 49.)

Present Act:

> "Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board,

are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation or to any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

It is apparent that the language of the present Act is almost exactly the same as that of the Federal Trade Commission Act except that the present Act adds the power to revoke and except that there are natural varia-

tions of language due to the different types of operations involved. Also, although we have not set forth the material here, the Court will note that the language used in the Federal Trade Commission Act regarding enforcement of subpoenas, taking of depositions, and immunity of witnesses (15 U. S. C. A., Sec. 49), is almost identical with subdivisions (2) and (3) of Section 11 of the present Act. We therefore believe that the *Cudahy* case on this ground is clearly applicable to the present case.

The fourth point made by the Court in the *Mohawk* case (331 U. S. 111, 121) is that the Emergency Price Control Act gave the Administrator specific power to issue rules and regulations, whereas the Fair Labor Standards Act did not do so. Without more, the present Act would thus be more like the Emergency Price Control Act because Section 6 of the present Act does give the Board power to issue rules and regulations. However, it should also be noted that the Court in the *Mohawk* case states that the rule making power may show authority to delegate a particular function "unless by express provision of the Act or *by implication*, it has been withheld." (331 U. S. 111, 121.) (Emphasis added.) We have already shown that the first three points relied upon by the Court in the *Mohawk* case prove that the present Act has, by implication, clearly withheld the power to delegate the subpoena authority. Therefore, as the Court in the *Mohawk* case recognized, the mere existence of the rule-making power is not enough to overcome the other factors.

The fifth point mentioned by the Court in the *Mohawk* case as more or less an afterthought, is that the Emergency Price Control Act set up a program which was very broad and extensive—"probably the most compre-

hensive legal control over the economy ever attempted," (331 U. S. 111, 122)—and that the Administrator of that statute would have had difficulty performing personally all of the investigative functions given to him. The National Labor Relations Board has broad powers and a good deal of work, but it is obvious that its job in handling labor cases is much less extensive than the work performed under the Emergency Price Control Act.

It is, of course, true that if the National Labor Relations Board followed the plan and simple dictates of the Act and subpoenas were issued and/or revoked by the Board or members of the Board, the members would have more work than if they merely signed a stack of subpoenas in blank and permit the Regional Director and the Trial Examiner to issue and/or revoke them. But there is good reason why that should be so. The *Cudahy* case stated the principle very well in answer to the argument that it would be hard for the Administrator of the Fair Labor Standards Act to issue the subpoenas personally (315 U. S. 357, 363):

> "The Administrator . . . points to the wide range of duties imposed upon him, the vast extent of his territorial jurisdiction, and the large number of investigations required for the enforcement of the Act. From this he argues that Congress must have intended that he should be permitted to delegate his authority to sign and issue subpoenas. But this argument loses force when examined in the light of related provisions of the Act and of the actual course of Congressional legislation in this field.
>
> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of

> oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. Under the present Act, the subpoena may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business, covering considerable periods of time. True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation. All these are cogent reasons for inferring an intention of Congress not to give unrestricted authority to delegate the subpoena power which it has in terms granted only to the responsible head of the agency."

In light of the five points made by the Court in the *Mohawk* case, we think the conclusion is inescapable that every factor points to the conclusion reached in the *Cudahy* case—the subpoena power is not delegable.

As the Board's Brief states, the Court of Appeals for the Seventh Circuit held in *N. L. R. B. v. John S. Barnes Corp.,* 178 F. 2d 156 (7th Cir., 1949), that the power to issue subpoenas could be delegated by the National Labor Relations Board to the regional directors. This case was followed by the Fifth Circuit without any real discussion of the point in *J. B. Edwards v. N. L. R. B.,* 189 F. 2d 970 (5th Cir., 1951), and in *Jackson Packing Co. v. N. L. R. B.,* 204 F. 2d 842 (5th Cir., 1953). As the Board points out, the *Barnes* case did examine the

problem and is on the point. The only difficulty with the *Barnes* case is that it is demonstrably erroneous and unsound. Since we believe this Court should reach a conclusion contrary to the *Barnes* case, we wish to discuss that case point by point.

The Court, in the *Barnes* case, first stated (178 F. 2d 156, 158) that if the language of Section 11 were the only thing to consider, the Court would be "inclined to agree" that the Board has no power to delegate. In our opinion, this is the only correct point made by the *Barnes* case.

In the second place the Court stated (178 F. 2d 156, 159) that the mere fact that certain sections of the Act give authority to delegate does not deprive the Board of the power to delegate other functions. This statement is much too broad, since the question obviously depends upon the nature of the power which is given expressly and the nature of the power which is attempted to be implied. Also, the statement, as applied to the present situation, is in direct conflict with the decision of the Supreme Court in the *Cudahy* case and the view expressed by the Supreme Court in the *Mohawk* case as part of its discussion of the *Cudahy* case.

The third point made by the Court in the *Barnes* case (178 F. 2d 156, 159) is that Section 5, which, as noted above, gives authority to "prosecute any inquiry", includes the power to issue subpoenas. This is the equivalent of saying that because the Department of Justice can investigate possible violations of law or inquire into such violations, the Department of Justice can issue subpoenas. Also, Section 5 gives the board authority to make inquiries and if, as the *Barnes* case states, Section 5 includes the power to issue subpoenas, Section 11 would be super-

fluous. The fact is that Section 11 was obviously intended to cover the subpoena power specifically and Section 5 certainly was not so intended. We submit that the power to delegate as given in Section 5 regarding inquiries, not only does *not* give the power to delegate the issuance of subpoenas, but actually negates any such implication in Section 11, as the *Mohawk* case points out. (331 U. S. 111, 121.)

The fourth point of the Court in the *Barnes* case (178 F. 2d 156, 159) is that Section 6—the rule-making power—permits the Board to adopt a regulation authorizing a Regional Director or a Hearing Officer to issue subpoenas. Here again, the Court in the *Barnes* case, although it quotes the *Mohawk* case, fails to note that the Court in the latter case specifically stated that the rule-making power cannot serve as a source of delegation where the statute *by implication* withholds such power. (331 U. S. 111, 121.) We submit that in view of the other factors already noted, the reliance of the Court in the *Barnes* case on the rule-making power is entirely unjustified.

The fifth point of the *Barnes* case (178 F. 2d 156, 160) is that "the administration of the Act must be flexible", and if the Board, or a member of the Board, were required to follow the terms of the statute and to issue the subpoena, the application for the subpoena would have to go to Washington and it would not be as easy or convenient for parties to obtain subpoenas. We submit that this is further evidence of the loose thinking of a type which has caused some Courts to give administrative agencies powers which were never intended by Congress, and which has permitted the bureaucratic processes to usurp functions which traditionally and properly should

be reserved to the Courts. Despite the *Barnes* case, we believe that the power to issue subpoenas is not analogous to the power of inquiry. It is a power which should not be given lightly. The *Cudahy* case put the matter into clear language when it said (315 U. S. 357, 363):

> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer."

If, as appears from the statute itself, as the Court in the *Barnes* case admits, and as appears from the legislative history, the statute provides that the Board or members of the Board shall issue the subpoenas, and the Board shall revoke subpoenas, what sort of an argument is it which justifies delegation on the basis of convenience. Members of the Board are appointed by the President with the advice and consent of the Senate. (Sec. 3(a) of the Act.) Presumably, the Board is a responsible agency and Congress apparently believed that when the very important subpoena power is given to an administrative agency, convenience is secondary to the fact that responsible persons must exercise the power—not merely any person who might be picked out by the Board. Essentially, the question on this point raised by the *Barnes* case depends upon the importance attached to the subpoena power. The Court in the *Barnes* case apparently regards this power as relatively unimportant.

The same sort of argument is made by the Court in the next, the sixth point, of the *Barnes* case (178 F. 2d 156, 160.) The Court says that if the power to issue the subpoena is not delegable, the power to revoke the

subpoena likewise is not delegable. That conclusion is exactly correct and is exactly what Section 11(1) says. The Court then states that every petition to revoke would have to be passed upon by at least three members of the Board, which would take so much time that the Board could not perform its other "more important duties." Again, we submit that this shows a lack of importance attached to the subpoena power by the Court. We think the Court can have no more important function than that of using the power of the United States to force the production of testimony by subpoenas.

Another factor which indicates the importance of the subpoena power is that, under Section 11(3) of the Act, if a witness is called and compelled to testify after he has claimed the privilege against self-incrimination, he is granted complete immunity from prosecution. In the hands of irresponsible persons, this power could prove dangerous.

The seventh point of the *Barnes* case (178 F. 2d 156, 160) is that the National Labor Relations Board had followed the practice of having subpoenas signed in blank and had delegated the power to issue subpoenas as early as 1941, that Congress must have been aware of this practice, and that Congress by amending Section 11 by the Labor Management Relations Act of 1947, impliedly approved the practice of the Board.

There are several answers to this argument. The first is that the rule stated by the Court applies only where the statute is ambiguous. An administrative agency cannot expand its powers under a statute by an administrative practice no matter how many times Congress acts to reenact or to amend such a statute.

The second answer is that when Congress, by action of the Conference Committee, deleted the authority to delegate the power to issue subpoenas as such power was originally set forth in the House Bill, H. R. 3020, and likewise deleted the authority to delegate the power to revoke subpoenas as originally contained in the same Bill, it is certainly clear that Congress did not intend the Board, or its members, to delegate either issuance or revocation. Whether or not Congress actually knew of the prior practice of the Board, we cannot say, but certainly the language and the legislative history indicate that Congress did not intend to approve any such administrative practice. Presumably, Congress did not feel the need to say to the Board "You cannot delegate", when the language was so clear. Furthermore, as the *Barnes* case points out, Section 11 was changed substantially by the 1947 amendment. Therefore, the argument of implied ratification by Congress of the Board's practice, is not applicable.

A third answer might be that Congress was aware of the *Cudahy* decision (1942) holding that the subpoena power under the Federal Trade Commission Act could *not* be delegated, and that by adopting language in Section 11 of the present act so similar to that of the Federal Trade Commission Act (15 U. S. C. A., Sec. 49), Congress, in 1947, impliedly ratified the *Cudahy* decision.

The eighth point of the *Barnes* case (178 F. 2d 156, 161) is that the action of the Board, or one of its members, in issuing a subpoena is only ministerial, whereas the action of the administrative agency in the *Cudahy* case was discretionary. We submit that when the issuance of the subpoena was made automatic, with the power

of revocation, the Congress might well have considered that this would make it even more important to have the power vested in responsible persons, such as the Board, or its members, rather than in unknown subordinates. Also, it should be noted that the agency issuing the subpoena must determine (a) whether there is a proceeding pending such as described in Section 11(1) and (b) whether the applicant is a bona fide party to the proceeding. This action is not ministerial. Also, the power to revoke obviously involves an additional amount of discretion, yet on the theory of the *Barnes* case, the power of revocation can also be delegated to any agent the Board wishes to designate. We submit that the issuance of subpoenas is not ministerial, but, in any event, we believe that the history of the protection of individual rights in this country, shows that the subpoena power is more important than the Court in the *Barnes* case considers and that administrative agencies should not be given the power lightly.

The ninth point of the case (178 F. 2d 156, 161) is that the *Cudahy* case is not in point because of several factors. First, the Court says, in effect, that Section 4(c) of the Fair Labor Standards Act is not as broad from the standpoint of delegation as Section 5 of the present Act. Section 4(c) of the Fair Labor Standards Act provides:

> "The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place." (29 U. S. C. A., Sec. 204(c).)

Section 5 of the present Act, as already mentioned above, provides that:

> "The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. . . ."

We submit that the distinction between Section 4(c) and Section 5 is a very weak argument for distinguishing the *Cudahy* case.

The Court also says that in the *Cudahy* case the Supreme Court emphasized that a provision authorizing delegation of the subpoena power had been eliminated when the Bill was in Congress. If the Court in the *Barnes* case had inquired, it might have discovered that a provision authorizing delegation was eliminated from the House Bill in the Conference Committee when the present Act was being adopted.

The *Barnes* case also states that in the *Cudahy* case the Supreme Court had stated that such Court was not then concerned with the practice of some of the agencies, including the National Labor Relations Board, of delegating the issuance, though not the signing, to subordinates. Does the Court in the *Barnes* case mean by this statement that if, in the *Cudahy* case, the subpoenas had been rubber-stamped in blank and given to subordinates to issue, as done by the National Labor Relations Board, that the Supreme Court in the *Cudahy* case would then have approved such issuance of the subpoenas? Such a position seems to be rather silly and not really worth

argument. As a matter of fact, the whole point of the *Barnes* case, up to this stage, is that the National Labor Relations Board *has* delegated the issuance of subpoenas. Its reference to the quotation from the *Cudahy* case is meaningless.

The tenth and last point of the *Barnes* case (178 F. 2d 156, 162) is that the *Mohawk* case is the most recent one involving this delegation problem, and the *Barnes* case says:

> "All of the reasons assigned by the Supreme Court for sustaining the validity of the delegation of the subpoena power in the *Mohawk* case, apply to the instant case, except that the Act here did make expressly delegable certain powers other than the power to issue subpoenas."

If further evidence of the weakness of the *Barnes* decision were needed, it is provided in this final comment. The fact is that of the points relied upon by the Supreme Court in the *Mohawk* case, every point but one leads to the conclusion that the *Cudahy* case applies here. The only point as to which the *Mohawk* case is similar to the present case is that in both the Emergency Price Control Act and the present Act, the administrative agency has the rule-making power. And, as the Court in the *Mohawk* case specifically stated, although this was disregarded by the *Barnes* case, the rule-making power cannot be relied upon for authority to delegate where Congress, by implication, has withheld such authority.

We submit that the argument of the Court in the *Barnes* case is replete with inaccuracies, inconsistencies and error. The Court (1) has overlooked Section 5 in the Court's reliance on Section 9(c)(1); (2) the Court

has misinterpreted Section 5, when it says that power includes the power to issue subpoenas; (3) the Court has greatly over-emphasized Section 6—the rule-making power—and has disregarded the language of the *Mohawk* case in this respect; (4) the Court's argument for flexibility of administration and ease of issuing and revoking subpoenas completely overlooks the importance of the subpoena power and the great need that such power be exercised by a responsible agency and not by every Tom, Dick and Harry, if individual rights are to be protected; (5) the Court's reliance upon the administrative practice prior to 1947 is clearly in error where the Act itself is specific, where Section 11 was revised, and where in conference the delegation provisions were eliminated; (6) the Court's attempt to distinguish the *Cudahy* case and the Court's reliance on the *Mohawk* case are in complete disregard of the actual decision in the *Mohawk* case.

We suppose it is obvious by now that we believe the *Barnes* decision to be one of the most superficial and poorly reasoned decisions to be handed down by a Court of Appeals. The other two cases cited by the Board from the Fifth Circuit—the *Edwards* case and the *Jackson Packing* case, *supra,* are meaningless, since the Court in these cases blindly relied upon the *Barnes* case without any analysis of the problem. We, therefore, submit that any true examination of this question can result in only one conclusion—the *Cudahy* case, as interpreted by the *Mohawk* case, is clearly applicable here and the *Barnes* case is clearly wrong.

The Board urges upon this Court that the Administrative Procedure Act vests Trial Examiners with subpoena powers co-extensive with those of the agency. The Board relies on Section 7(b) of the Administrative Procedure

Act as support for this proposition. As the Board states its legal position at page 10 of its Brief:

> "We are not concerned with *implied* powers of delegability under the National Labor Relations Act but rather are concerned with an *express* conferment of subpoena powers on Trial Examiners under Section 7(b) of the Administrative Procedure Act."

Let us examine Section 7(b) and determine whether there has been "express conferment" of subpoena powers upon Trial Examiners. Section 7(b) of the Administrative Procedure Act provides:

> "* * * Officers presiding at hearing shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) *issue* subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act." (Emphasis added.)

The Board makes out an express conferment of the power to revoke subpoenas from the power given hearing officers to issue subpoenas, to rule upon offers of proof and receive relevant evidence, and to dispose of procedural requests or similar matters.

Not only does Section 7(b) not expressly confer the power to revoke subpoenas upon hearing officers, but we

respectfully submit that it in effect denies this power to hearing officers. Section 7(b)(2) authorizes hearing officers to issue subpoenas. That is the extent of the power given hearing officers under the Act. The Court is familiar with the principle of law that, where Congress has dealt specifically with a subject and granted certain powers, it is deemed to have withheld other powers. We contend that, when Congress only granted hearing officers the power to issue subpoenas, Congress intended to deny hearing officers the power to revoke subpoenas. We further contend that Congress intended that petitions to revoke subpoenas should be ruled upon by the agency itself or Courts of law.

The Board correctly states that in *N. L. R. B. v. International Typographical Union*, 76 Fed. Supp. 895, and in *N. L. R. B. v. Gunaca*, 135 Fed. Supp. 790, aff. 230 F. 2d 542, the District Courts held that Section 7(b) of the Administrative Procedure Act gives Trial Examiners of the National Labor Relations Board power to revoke subpoenas.

A reading of these decisions indicates that the Courts arrived at this decision under a so-called "rule of convenience", to wit, that, if the Trial Examiner did not have the power to revoke subpoenas, litigants could literally swamp the Board with petitions to revoke subpoenas and thereby "sabotage the function of the National Labor Relations Board." The decisions themselves recognize that there is no *express* conferment of the power to revoke subpoenas under the Administrative Procedure Act, but uphold an implied power by virtue of Section 7(b). We submit that the District Courts reached this result without giving sufficient consideration to the serious abuses which can, and have, arisen through the exercise

of the subpoena power. As the United States Supreme Court said of the subpoena power in the *Cudahy* case (315 U. S. 357, 363):

> "It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer."

Legislative history shows that Congress intended to make it easy for a party to obtain the issuance of a subpoena but require the agency itself or the Courts to rule upon petitions to revoke subpoenas. If Congress intended that hearing officers should have the power to revoke subpoenas, it could have said so in Section 7(b) of the Administrative Procedure Act. Congress did not do so. It simply granted hearing officers the power to issue subpoenas.

The Board asserts that, since the Board has, under its rule-making power, delegated authority to the Trial Examiners to revoke subpoenas, the power of the Board to issue such a rule cannot be questioned. However, Board rules can not have the effect of amending the law. An agency rule cannot change positive provisions of the statute. (*United States v. Gredzens*, 125 Fed. Supp. 867.) Section 11, National Labor Relations Act, and the legislative history thereof, clearly indicates that Congress intended that the Board itself exercise the subpoena power and that such power can not be delegated by rule or otherwise.

The Seventh Circuit's action in affirming *N. L. R. B. v. Gunaca, supra*, which upheld the power of Trial Examiners to rule on petitions to revoke, was based on the Seventh Circuit's earlier opinion in *N. L. R. B. v. Barnes, supra*. We have set out at length our reasons why the

Barnes decision was wrongfully decided, and, of course, the argument is equally applicable to the issue of the power to revoke subpoenas as it is on the power to issue subpoenas.

If, as we contend, Section 7(b) does not expressly confer subpoena powers on Trial Examiners, then the issue before this Court is whether or not the power to delegate subpoena powers to Trial Examiners can be implied under the National Labor Relations Act. For the reasons previously stated under this point, we assert that the power of delegability of the subpoena power can not be implied under the Act, since Congress expressly granted this power to the Board itself. The *Cudahy* case upholds our contention that delegability of the subpoena power can not be implied under the Act.

Under point IC (App. Br. pp. 15-20) the Board asserts that, apart from the Administrative Procedure Act, Trial Examiners have full subpoena powers. The Board relies entirely on the *Barnes* case, *supra,* to support this proposition. All of the issues raised by the Board have been previously disposed of in our discussion of the *Barnes* case. The *Edwards* case, *supra,* 189 F. 2d 970; and *Jackson Packing Co.* case, 204 F. 2d 842, simply cite the *Barnes* case, *supra,* and make no independent review of the issues. They stand or fall with the *Barnes* case.

In view of the foregoing, it is submitted that the Court below correctly ruled that the power to revoke subpoenas does not reside in Trial Examiners under either the Administrative Procedure Act or the National Labor Relations Act.

II.

All Subpoenas Here Involved Are Invalid Because They Were Issued Without a Proper Application Therefor.

Section 11(1) of the National Labor Relations Act provides that a subpoena shall be issued "upon application of any party to such proceedings." Since the Board has seen fit to rely on the Administrative Procedure Act on the first issue, let us turn to the Administrative procedure Act on this issue for a definition of the word "party." Section 2 of the Administrative Procedure Act defines the word in the following terms:

> " 'Party' includes any person or agency named or admitted as party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding."

Section 6 of the Administrative Procedure Act provides:

> "Agency subpoenas authorized by law shall be issued to any *party* upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." (Emphasis added.)

It is clear that under the Administrative Procedure Act, the General Counsel and Counsel for the General Counsel are not parties to this proceeding, since they have not been named or admitted as a party.

Section 102.58(c) of the Board's Rules and Regulations provides that a subpoena shall be issued "upon application . . . in writing by any party."

The term "party" is not defined in the Act, but it is defined in Section 102.8 of the Board's Rules and Regulations as follows:

> "Sec. 102.8 Party.—The term 'party' as used herein shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8(a)(1) or 8(a)(2) of the act; but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only."

In what appears to us to be an obvious confession of weakness, the Board in its Brief under this point nowhere referred to its own rules and regulations which define the term "party." The reason that the Board failed to quote Section 102.8 of its own rules and regulations is that the term "party" does not include the General Counsel.

If we assume that the Board's definition of "party", as set forth in Section 102.8 of its rules and regulations is correct, it is apparent that the applications for the subpoenas were not made by a "party" as required by the Act and by the regulations. The application for each subpoena was made by E. Don Wilson, described in the subpoena as "Counsel for the General Counsel."

Subpoenas issued pursuant to the request of an attorney for the General Counsel or an attorney for the Regional Director of the Board are not issued upon application of a "party" to the proceeding and must be quashed as invalid. (*N. L. R. B. v. Pesante,* 119 Fed Supp. 444; *N. L. R. B. v. Duval Jewelry Co.*, 141 Fed. Supp. 860.)

The Board in its Brief argues that pursuant to Section 3(d) of the Act, the General Counsel is the prosecutor or unfair labor practice complaints and is, therefore, a party to the proceeding. The Board, however, ignores the fact that Section 3(d) vests in the General Counsel "final authority, *on behalf of the Board,* in respect to . . . the prosecution of complaints." (Emphasis added.) The General Counsel is the attorney for the Board in prosecuting unfair labor practice complaints. The Board is a party to this proceeding. The General Counsel is no more a party to this proceeding than would be the District Attorney in a proceeding brought on behalf of the People of the State of California.

The statement by the Board in its Brief at pages 22 and 23 that if the General Counsel does not have the power to apply for subpoenas, then it is without power to investigate or compel the attendance of witnesses, has no substance whatsoever. The General Counsel can obtain the issuance of a subpoena in unfair labor practice proceedings simply by having any member of the Board apply for the subpoena or by having the charging party apply for the subpoena.

The case of *N. L. R. B. v. Kingston Trap Rock Co.*, 222 F. 2d 299, relied upon by the Board, is completely inapposite. The case simply involved the question as to whether or not associate general counsel had the power

to investigate charges against an employer after the term of the General Counsel of the Board had expired. Further than that, the *Kingston Trap Rock* case involved a subpoena issued by the Regional Director who is defined as a "party" under the Board's regulations. This case involves the power of counsel for the General Counsel to apply for a subpoena.

It is clear that the General Counsel is not a party as defined in the Act, or the Board regulations; even if the General Counsel were a proper party, which he is not, there is nothing in the Act or in the regulations which authorizes him to delegate his authority to make application for subpoena to one of his subordinate employees.

Conclusion.

For the reasons stated, we submit that each subpoena is invalid and that the order of the District Court refusing to enforce said subpoenas should be affirmed.

Respectfully submitted,

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